MACCSAND (PTY) LTD v CITY OF CAPE TOWN & OTHERS CCT 103/11 [2012] ZACC 7

Importance	The Constitutional Court's decision in this matter now provides clarity on the relationship between the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the Land Use Planning Ordinance 15 of 1985 (LUPO) (and by extension, other legislation dealing with land use planning). The Court's dictum is that the MPRDA cannot trump the LUPO. The Court also found that the reference to 'relevant law' in s 23(6) of the MPRDA should be accorded a wide meaning that includes reference to LUPO. A possible unintended side-effect of the court's judgment is that they may have introduced a form of landowner consent into the prospecting/mining authorization process because (as in this case) the person who may apply for rezoning is the land owner. The court did point out, however, that both the municipality and the provincial government could instigate the rezoning process. As regards the question whether the MPRDA trumps the NEMA, the judgment is disappointing as leave to appeal for the court to decide the matter was refused. It seems, however, that the court's reasons for dismissing this issue were at least in part based on a wrongful assumption about which provisions of the NEMA are in operation.
Parties	**Applicant:** Maccsand (Pty) Ltd. **First respondent:** City of Cape Town. **Second respondent:** Minister for Water Affairs and Environment. **Third respondent:** MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province (the Province). **Fourth respondent:** Minister for Rural Development and Land Reform **Fifth respondent:** Minister for Mineral Resources. **Amici Curiae:** Chamber of Mines of South Africa; Agri South Africa.
Facts	The salient facts in this matter are set out in the fact sheet for the hearing in the Western Cape High Court (see *City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WCC)). In the High Court, the City of Cape Town and the MEC for Local Government Affairs and Development Planning, Western Cape, were successful in obtaining an interdict prohibiting Maccsand from continuing with mining activities until it had obtained authorizations under both the Land Use Planning Ordinance 15 of 1985 (LUPO) and the National Environmental Management Act 107 of 1998 (NEMA). Maccsand appealed against this decision to the Supreme Court of Appeal (*Maccsand (Pty) Ltd & Minister of Mineral Resources v City of Cape Town & others (Chamber of Mines as* amicus curiae*)* [2011] ZASCA 141 (23 September 2011)). The SCA upheld the court *a quo*'s finding regarding the need for LUPO authorization but set aside the interdict insofar as it related to the NEMA on a technical issue. The judgment of the Western Cape High Court had been delivered on 20 August 2010. Unbeknown to this court, GNR 386 had been repealed in its entirety on 2 August 2010. This meant that listed activities 12 and 20 were no longer in operation. Although the Province believed that these activities were now encompassed by activity 13 of GNR 546 of the 2010 EIA regulations, it was not able to bring this issue properly before the court. The SCA accordingly held that since activities 12 and

	20 could not be contravened in future, it rendered the prayers for the interdicts 'redundant' (para 37). The Province nevertheless asked the court to give guidance by way of declaratory relief on the relationship between the MPRDA and NEMA. This the court expressly refused to do, citing as authority s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 and the interpretation thereof in *Shoba v Officer Commanding, Temporary Policy Camp, Wagendrift Dam & another v Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & another* 1995 (4) SA 1 (A). The court, Plasket AJA warned on behalf of a unanimous bench, will not pronounce upon abstract or academic points of law. It is necessary that there be an interested party. The hypothetical nature of the dispute entitled the court to refuse to engage with it. The SCA accordingly set aside those parts of the order that related to the NEMA issue. Maccsand subsequently appealed against the SCA's decision to uphold the interdict as regards the need for LUPO authorization, while the Province cross-appealed the SCA's decision to refuse to grant declaratory relief in respect of the conflict between the MPRDA and NEMA.
Relief Sought	Appeal against a decision of the SCA to uphold the need for LUPO authorization; cross-appeal against the SCA's decision to refuse declaratory relief in respect of the conflict between the MPRDA and NEMA.
Legal Issues & Judgment	***Issue 1:*** Can a holder of a mining right or permit granted in terms of the MPRDA only exercise those rights if the zoning scheme made in terms of the LUPO permits mining on the land in respect of which the mining right or permit was issued? ***Judgment:*** In responding to this issue, the Constitutional Court dealt firstly with the argument that the application of LUPO to land in respect of which mining rights have been granted would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government (para 41). The court disagreed, pointing out that the LUPO and the MPRDA served different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governed mining, LUPO regulated the use of land. While acknowledging that an overlap between these two laws could occur, the court held that such overlap did not constitute an impermissible intrusion by one sphere into the area of another 'because spheres of government do not operate in sealed compartments' (para 43). There was nothing in the MPRDA suggesting that LUPO would cease to apply to land upon the granting of a mining right or permit (para 44). Responding to the argument that the reference to 'relevant law' in s 23(6) of the MPRDA was restricted to laws applicable to mining (such as the Mine Health and Safety Act 29 of 1996), the court noted that as the MPRDA did not define the phrase 'relevant law' it had to be accorded its wide meaning. As such it included reference to the LUPO as a 'relevant law' to which the grant of the mining right was subject (para 45). A closely-related argument submitted by the applicant, was that finding that mining is subject to compliance with LUPO permitted a local authority to usurp the functions of national government in a

	manner not contemplated by the Constitution. This received short shrift from the Constitutional Court as well, with the court holding that because the LUPO regulates the use of land and not mining it was not possible to assert that it enables local authorities to usurp national government functions (para 46). A further criticism raised by Maccsand and the Minister of Mineral Resources was that allowing for LUPO authorization enabled the local sphere to veto decisions of the national sphere on mining, which was an exclusive competence of the national sphere. While initially finding that this argument was attractive 'at face value', the court resorted again to the justification that spheres of government do not operate in 'hermetically sealed compartments' and that the exercise of powers by different spheres could result in an overlap. When this occurred, neither sphere was intruding into the functional area of another. In this context, the court advised, the Constitution obliges these spheres of government 'to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another' (para 47). It is therefore permissible in South Africa's constitutional order for mining activities not to take place until the land in question is appropriately rezoned (para 48). Maccsand pointed out that because LUPO requires the owner of land to initiate the zoning process, rezoning of the land would never take place in the matter at hand because of the City's clear opposition to it. The Court noted this but held that it was still open to Maccsand to request the Provincial Government to intervene and have the rezoning effected (para 49). Although Maccsand and the Minister for Mineral Resources also argued that the MPRDA-LUPO conflict needed to be resolved by s 146 of the Constitution, the court found that this provision is only applicable to conflicts of legislation falling within a functional area listed in Schedule 4 (para 50). More importantly though, they were of the opinion that there was no conflict because the LUPO and the MPRDA are concerned with different subject matter (para 51).
	Issue 2: Should the general declarator on the conflict between the MRPDA and NEMA be granted? ***Judgment:*** The court refused to grant the Province leave to cross-appeal because it ostensibly had no chance of success. Pointing to s 24C(2A) of the NEMA (a provision which is not yet in operation), the court held that at present there is no active EIA listing which authorizes the Minister for Mineral Resources to grant an authorization (para 53).
Outcome	The court dismissed the appeal against the SCA's decision that upheld the need for LUPO authorization in respect of land to which a mining right has been granted.
Obiter	None